

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

FAO.No. 213 of 2007()

**AGAINST THE ORDER DATED 12/04/2007 IN IA.1173/06 IN
AS.20/2005 of SUB COURT, HOSDRUG**

APPELLANTS/PETITIONERS/APPELLANTS:

**1. MADAVANA IMMANUEL, S/O. AUGUSTINE,
KARALOM, BALAL VILLAGE, HOSDURG, KASARAGOD DIST.**

**2. THAKAMMA IMMANUEL,
W/O. IMMANUEL OF -DO- -DO-.**

**3. BIJU M. MANUEL,
S/O. IMMANUEL OF -DO- -DO-.**

BY ADV. SRI.SUBHASH CYRIAC

RESPONDENTS: RESPONDENTS/RESPONDENTS:

**NARIKUZHIYIL THRESSIAMMA,
W/O. LATE DEVASIA, KARALOM, BALAL VILLAGE, HOSDURG.**

BY ADV. SRI.M.SASINDRAN

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 10/10/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

K. PADMANABHAN NAIR, J.

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F.A.O. NO. 213 OF 2007

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Dated this the 10th day of October, 2007

J U D G M E N T

Appellants in this appeal are the appellants in A.S. No.20 of 2005. That appeal came up for hearing on 12.10.2006. On that day appellants and counsel were absent. Appeal was dismissed for default. Appellants filed I.A. No.1173 of 2006 to restore the appeal dismissed for default. Respondents filed a counter affidavit disputing the genuineness of the medical certificate produced along with the application for restoration. Lower appellate dismissed the restoration application. Challenging the said order, this appeal is filed.

2. It is an admitted fact that the appeal was posted for hearing in the special list on 12.10.2006. On that day appellants and counsel were absent. According to the appellants the person who was conducting the case was laid up and hence no proper instructions could not be given. It is true that the genuineness of the medical certificate was disputed and the doctor who issued the said medical certificate was not examined. Lower appellate court itself

found that it was not necessary for the party to be present in court on 12.10.2006 and counsel appearing for the appellants could have appeared and argued the matter. The appeal happened to be dismissed not for the default of the appellants but for the default of the counsel. The counsel has a duty to appear and conduct the case. But as rightly observed by the court below mere physical presence of the appellants was not necessary. So even if the medical certificate produced was false, the court below ought to have given another opportunity to the appellants to argue their case on merits. For that purpose, the impugned order has to be set aside.

3. In the result, this appeal is allowed. The order passed in I.A. No.1173 of 2006 is set aside and the I.A. is allowed. A.S. No.20 of 2005 is restored to file. Lower appellate court is directed to take A.S. No.20 of 2005 back to file and dispose of the same afresh in accordance with law, after giving opportunity to both sides to argue the appeal.

Parties are directed to appear before the Sub Court, Hosdurg, on 23.11.2007.

K. PADMANABHAN NAIR, JUDGE.

K. PADMANABHAN NAIR, J.

F.A.O. NO. 213 OF 2007

J U D G M E N T

10TH OCTOBER, 2007